No. 170

In the

Supreme Court of the United States

OCTOBER TERM, 1957

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Petitioners,

v.

GULF OIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cephas E. Sword and Houston Fire and Casualty Company pray that a Writ of Certiorari issue to review the action and the judgment of the United States Court of Appeals for the Fifth Circuit, entered January 24, 1958. Petition for rehearing was denied April 23, 1958.

1.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals printed in Appendix A hereto is reported *251 Fed. 2d 829.*

2.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1958. Rehearing was denied on April 17, 1958. The jurisdiction of this Court is invoked under Article 28, U. S. C., Sec. 1254(1).

3.

QUESTIONS PRESENTED

I.

Whether a Court of Civil Appeals may, in rendering its judgment in a diversity case, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state?

II.

Whether a Circuit Court of Appeals may affirm the judgment of the trial Court rendering a summary judgment in a case where the evidence raised issues of fact for the jury without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

III.

Whether the United States Supreme Court will permit local law as determined by a Circuit Court of Appeals to control over the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States?

IV

Whether the Court erred in holding that under the law of Texas that the doctrine of inherently dangerous work does not inure to the benefit of the employee of the contractor?

V.

Whether the Court erred in holding that the trial court was correct in entering its summary judgment for the appellee Gulf Oil Corporation, in this cause?

VI

Whether the Court erred in granting a motion for summary judgment after the motion for instructed verdict had been overruled by the Court and after the jury had failed to reach a decision. A new trial should have been ordered by the trial court?

VII

Whether the Court erred in holding that, under the circumstances here involved, that it was not the duty of Gulf Oil Corporation to inspect the work as it progressed to see if they had furnished reasonably safe place to work to their invitee, Sword?

4.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Constitutional provisions involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. The statutory provison involved in this case is the Rules of Decision Act, *28 U. S. C., Sec. 1652* which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

STATEMENT

This is a diversity of citizenship case filed for serious injuries to Cephas E. Sword. Sword was an invitee upon the premises by virtue of being an employee of a contractor employed by Gulf Oil Corporation. The Circuit Court of Appeals, in its opinion describes the situation correctly with the exception that they failed to point out that Gulf under its contract reserved the right to see that the work

was performed with maximum safety, and they correctly held that the evidence was sufficient to show that had an inspection been made the absence of the guard from the master clutch could have been made in time to have avoided Sword's loss of his leg.

In Petitioner's motion for rehearing the following points were urged and are here now presented to this honorable Court as controlling the disposition of this petition in the determination of the above presented questions as set out under heading 3 of this petition.

That the 5th Circuit Court erred in holding that such control as Gulf retained was not sufficient to create a duty of inspection upon the part of Gulf. A recent case which petitioners discovered, following the rendition of the Opinion, as *Berquist v. Penterman, 134 Atlantic Reporter 2d, Pg. 20*, petition for certiorari in this case was denied by the Supreme Court of New Jersey; *134 Atl. Rep. 2d 832*, this case together with the Supreme Court of Texas decisions, particularly the *Genecov* and *Henger* cases, establish the right to certiorari. The Circuit Court has refused to discuss these cases and has said that they require *ar actual* control of the operation or a reserved right of control *more than* that deemed necessary to secure the said completion of the work.

In this case, the Circuit Court has refused to admit that Gulf, *occupied*, by virtue of the terms of its written contract, the position of *general contractor* or a coordinator or supervisor of the activities of the various contractors in such a manner as to *cast* upon it the *duty of inspection*.

The Circuit Court, however, has, *by express implication*, recognized that *Gulf was a coordinator* of the activities here involved in the following language:

> "It was desirable also for the protection of other persons who might come on the premises at Gulf's invitation, before the completion of the drilling, such as employees of companies specializing in drill stem testing, cementing, perforating well casing, casing testing, coring, acidizing, and other well services."

The holding that Gulf could reserve and did reserve *the right of inspection to provide a safe place for these specialty companies that Gulf*, as owner, *made direct contracts with, for various portions of the work as the drilling of the well progressed and as is shown by the terms of the contract*, is all that is required to make Gulf such a supervisor and coordinator as we have in the above three leading cases on this subject.

The Court apparently holds that Gulf was under a duty, which Gulf unquestionably was, to these people to exercise the duty of inspection to see that the place so furnished was reasonably safe. It is a matter of deep concern to Petitioners that the Circuit Court would refuse to discuss the real point urged here when same is so clearly supported by the Restatement of the Law of Torts, James and Harper's work on Torts published in 1957, and the settled law in Texas as declared by the Supreme Court of Texas in *Smith v. Henger, 226 S. W. 2d 425* and *Roosth & Gencov Production Company v. White, 262 S. W. 2d 99.*

Mr. Justice Rives seems to feel that it would be disastrous if the prediction of Dean Prosser came true that

ultimately the general rule will be that the employer is liable for the negligence of an independent contractor. However, this could never happen in many situations. We are concerned here not *with the rule, but with the exception:*

May it here be said that when one becomes a coordinator of activities and reserves a certain portion of control of the work, as did Gulf in this case, that this does not destroy the simple *employer-employee* relationship, *but simply engrafts and adds an additional exception* to the general rule that an employer is not generally liable for the negligence of an independent contractor.

The mere fact that the New Orleans Court disagrees with the holdings in the Texas cases is no reason for their *refusing* to *discuss the real point in this case* or *the real exception here involved.* The minority view expressed by Chief Justice Hutcheson in the *Wright* case has apparently now become the majority view of this Court, thus repudiating without logical excuse or explanation the many great opinions of the 5th Circuit upon this question, and in effect destroying all third party actions.

It is true that plaintiff waived his right of action at common law against his employer under the terms of the Workmen's Compensation Act, but *it was never intended that he should waive his cause of action against the employer of his employer in exceptional cases or in cases that come under the exceptions to the general rule, such as the case at bar.*

The Honorable Circuit Court of Appeals erred in holding in this case that under the law of Texas the employee of the independent contractor is not entitled to the protection of the inherently dangerous doctrine. The cases relied upon are *Union Tank & Supply Company v. Kelley, Cagle v. McQueen* and *Humble Oil & Refining Company v. Bell, 180 S. W. 2d 170.* The *Bell* case relied upon in the *Kelly* and *McQueen* cases was never authority for anything in Texas, save special employee, in that the Supreme Court of Texas wrote an opinion saying that the only reason that the writ was denied was that Bell *was a special employee of Humble.*

Since that time, our Texas courts have recognized that the doctrine of inherently dangerous work does inure to the benefit of the employee in later cases than the Bell case in which writs have been refused. The Supreme Court of Texas so held in *Lloyd v. Herrington, 182 S. W. 2d 1003*, and writ was denied in the case of *Texas Electric Service Co. v. Holt, 249 S. W. 2d 664 (Ft. Worth Court of Civil Appeals).*

Again, we respectfully point out that the case of *Nance Exploration Company v. Texas Employers' Insurance Association, 305 S. W. 2d 621*, is still pending before the Supreme Court, on motion for rehearing of the application of writ of error in this case. However, under the Texas system of writ of error, if the motion is overruled the refusal of the writ by the N. R. E. route, would not mean that the Supreme Court of Texas *approves* of the holding of the El Paso Court on this *one point* since there are *many other points* involved in the case.

The Circuit Court erred in holding under all of the facts, that the evidence in this case would not support a finding that Gulf owed any duty to Sword to inspect and to supervise the operation of the machinery furnished by Sword's employer.

The Circuit Court further erred in holding in its Opinion, on Page 7, as follows:

> "The appellants do not complain of the Court's failure to reserve its decision on the Motion for directed verdict as suggested in Rule 50(b), Federal Rules of Civil Procedure. See Slocum v. New York Life Ins. Co., 1913, 228 U. S. 364, 381, commented on in 2 Moore's Federal Practice, 2nd ed., Paragraph 2.04, pp. 326, 327, and 5 Id., Paragraphs 50.01 (8), 50.07, and 50.10."

We would respectfully point out that the petitioners did complain in Point No. 21 and Point No. 22 of the Court's error in entering judgment in this cause based upon the defendant's motion for summary judgment and of the Court's error in entering judgment in this cause based upon the defendant's motion for instructed verdict as filed in this cause at the close of all evidence in the case and we respectfully submit that such point was sufficient to raise the judicial question that the Court had no right to grant either the instructed verdict or the summary judgment after having submitted this cause to the jury in that the Supreme Court of the United States held in the *Slocum* case, supra, that such a practice violated the Seventh Amendment guaranteeing jury trials at common law or as stated in the text cited by the opinion.

> "It followed that, if a motion for directed verdict was erroneously overruled and a verdict improperly

had in Federal Court, neither the trial nor appellate court could set aside the verdict and enter a proper verdict but was obligated to grant a new trial."

In our Supplemental Brief filed before the 5th Circuit Court, petitioners alleged under Point No. 25 as follows, to-wit:

"The appellant was denied due process of law as guaranteed by the Seventh Amendment since, by the action of the Court, he is deprived of trial by jury."

It is therefore respectfully submitted that the only thing that this Honorable Court has jurisdiction to do is to reverse and remand this cause for a new trial on the merits thereof.

The honorable Circuit Court of Appeals states in footnote 2, "So far as we can discern the drilling report did not inform Ingle or Gulf of a continued absence of a guard over the open side of the master clutch."

However, Ingle, Gulf's representative on the job, admitted that he knew on July 3rd, 1952, about 2½ months before the accident, that the master clutch had to be repaired (R. 164), and Ingle flatly admitted that if a master clutch gets out of line, it represents a serious and dangerous thing to the rig if it is not properly repaired. (R. 166.)

The witness Raymond Knox, who was a driller representative for Gulf for many years and occupied the same position as Ingle, testified that on jobs where he was acting as Gulf's representative he had instructions from Gulf to make inspections of the equipment to see if it was adequate and to determine if maximum safety precautions

had been taken and observed, and that during the years that he was with Gulf that he would from time to time discover dangers, and have them corrected by Gulf. (R. 131.)

This evidence clearly proves that there was plenty of time for Ingle to have discovered the missing guard and have something done about it.

It clearly raised a fact issue as to Gulf's duty of inspection.

It must be borne in mind that under the Supreme Court of Texas decision in *Smith v. Henger, 226 S. W. 2d 425*, expressly held that it made no difference who created the danger, that it was the duty of one situated as Gulf to make inspections for the purpose of remedying the defects.

6.

REASONS FOR GRANTING WRIT

1. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

The holdings complained of under the preceding statement are in direct conflict with the Supreme Court of Texas decisions on this subject hereinabove and hereinafter set out, including the additional Texas Supreme Court decision of *McKee General Contractor v. Patterson, 271 S. W. 2d 391*, which held that the duties of inspection to

make and *keep* the premises reasonably safe was upon one occupying the states of Gulf in the case at bar.

Since the Court of Civil Appeals did not follow the law of Texas a typical situation is presented in which this Honorable Court has on a number of occasions granted writs of certiorari.

Erie R. Co. v. Tompkins, 304 U. S. 64;

Russell v. Todd, 309 U. S. 280;

Whichita Royalty Co. v. City National Bank, 306 U. S. 103;

Guaranty Trust Co. v. York, 320 U. S. 99.

See also *Rules of Decision Act, U. S. C., Section 1652.*

Certiorari was also apparently granted by this Honorable Court for this reason in *Phillips Petroleum Co. v. Gibson, 232 Fed. 2d 13, 1 L. Ed 2d 77.*

The granting of the writ by this Honorable Court in the *Gibson* case was a matter of great significance to the legal world and to all litigants in personal injury suits of the character here involved.

Following the decision of this Honorable Court in the *Gibson* case, supra, the United States Court of Appeals for the Ninth Circuit said:

> "In considering a case of this kind we should take note of the precedents established by the Supreme Court when it is proper to take a case from the jury. For although, this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail." *Smith v. Buck, 245 Fed. 2d 348.*

Citing with approval *Gibson v. Phillips Petroleum Co., 352 U. S. 874* and *Reynolds v. Pegler, 223 Fed. 2d 429.*

Professor Leon Green in an illuminating article entitled:

"Protection of Jury Trial in Diversity cases." June, 1957 Texas Law Review has this to say about the action of this Honorable Court in the *Gibson* case, supra:

> "The conclusion is that the Supreme Court was not willing to go along with the Texas Court in the determination of this issue as a matter of law by virtue of the local doctrine.
>
> "No doubt the controlling matter here is the attitude of the Supreme Court towards the protection of jury trial under the 7th Amendment. The doctrine of the Texas Court is a transparent device to syphon off the powers of the jury by converting a question of fact into a question of law."

On page 770 Professor Green continues:

> "Thus, under the Supreme Court decision it would seem that when the right of jury trial in the federal court collides with Erie v. Tompkins, the Supreme Court as in the F. E. L. A. cases will stick with jury trial and not allow practices of any type designed to deprive a litigant of his Constitutional right."

Citing *Dice v. Akron C. & Y. R.R., 342 U. S. 359*, and *Brown v. Western Ry. Co., 338 U. S. 294.*

Professor Green continues, page 770:

> "How far the Supreme Court is prepared to go in protecting jury trials in common law cases in the federal courts against state court invasions is an interesting question, and one highly important to litigants in the area of personal injuries."

Professor Green of the law faculty of the University of Texas agrees with the action of this honorable court in the *Gibson* case with these remarks:

> "In Texas, especially by virtue of its complex proximate cause and negligence per se doctrines, buttressed by intricate and numerous special issues, jury trial has been greatly impaired." Citing *Arnold v. Panhandle & Santa Fe Ry. Co., 77 Sup. Ct. 840.*

2. The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

E. G. Ives v. Grand Trunk R. Co., 638 S. Ct. 1077, 319 U. S. 372;

Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608.

3. The questions here presented have great importance and far-reaching effect.

There are hundreds of thousands of industrial workers not only in Texas but elsewhere who will be denied protection and go uncompensated for their personal injuries if the rule announced by the Circuit Court is permitted to stand.

It is quite obvious that the Circuit Court could not explain away their prior decisions nor could they explain in any definite manner why the Texas cases relied upon were not in support of petitioners' theory.

Such a general statement of the law appears to be one supported only by the immediate whim and caprice of the

Circuit Court and should not be permitted to stand in a federal court of justice in defiance of petitioners' constitutional right to trial by jury as well as the rights of those many thousands of seriously injured workmen who will likewise be denied their day in court.

It has long been the settled law of Texas that it is the duty of a general contractor or occupant of land, or owner and invitor, such as Gulf, to exercise ordinary and reasonable care to furnish the employee of the independent contractor coming upon the premises to work, a reasonably safe place in which to work. It is further the established law of Texas that this duty to furnish a safe place carries with it, in addition, a duty to warn an invitee such as Sword of any danger of which the invitee is unaware and of which the invitor, such as Gulf, has actual knowledge or could, in the exercise of ordinary care, have discovered and had actual knowledge of.

It is the plain holding of our Texas Courts that the invitor, occupant of land or general contractor, such as Gulf, *all of whom in Texas occupy the same relationship with respect to the duties owed an invitee, must make an inspection of the premises to determine whether or not the place that the invitee is working is reasonably safe* and further, thereafter, as the work progresses he must make further inspections to keep the place where the work is being performed reasonably safe. The Fifth Circuit did, heretofore in prior opinions, adhere to this rule, but now, for the first time, the Fifth Circuit has repudiated all of these holdings, not only of their own, but of the Supreme Court of Texas,

as well as the decisions of this Court, and held that an actual control of the work in question is necessary before the one such as Gulf can be liable. They have further mistakenly held the doctrine of inherently dangerous work does not inure to the benefit of the employee.

The above holdings of the Circuit Court in this case are in direct conflict with the following decisions:

Gulf Oil Corporation v. Wright, 236 Fed. 2d 46 (5th Circuit);

Sun Oil Company v. Pierce, 224 Fed. 2d 580 (5th Circuit);

United Production Corp. v. Chesser, 107 Fed. 2d 850 (5th Circuit);

Amacker v. Skelly Oil Company, 132 Fed. 2d 431 (5th Circuit);

Roosth & Genecov Production Co. v. White, 152 Tex. 619, 262 S. W. 2d 99 (Supreme Court of Texas);

Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A. L. R. 2d 853 (Supreme Court of Texas);

Texas Electric Service Co. v. Holt, 249 S. W. 2d 664 (Texas Court of Civil Appeals);

Wright v. Tudor City 12th Unit, Inc., et al., 12 N. E. 2d 307;

Phillips Petroleum Co. v. Gibson, 232 Fed. 2d 13, 1 L. Ed. 2d 77 (Supreme Court of the United States).

It is further quite apparent that under the decision in *Slocum v. New York Life Insurance Company, 228 U. S. 381*, the trial court had jurisdiction only to grant a new trial.

The law involved in this case is substantially the same as in the case of *Glen Hubbard Hurst, et al. v. Gulf,* in which a petition for certiorari is now being prepared.

For the purposes of brevity, reference is here made to a discussion of the law involved as discussed in the brief supporting the petition for certiorari in the *Hurst* case.

WHEREFORE, your petitioners respectfully pray this Honorable Court to grant the petition for writ of certiorari to the end that on review the Circuit Court may be directed to reverse its judgment.

Respectfully submitted,

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A separate Certificate of Service as required will be furnished by counsel.

APPENDIX A

CEPHAS E. SWORD AND HOUSTON FIRE AND CASUALTY INSURANCE COMPANY, *Intervener*,
Appellants,

versus

GULF OIL CORPORATION,
Appellee.

No. 16357

United States Court of Appeals

FIFTH CIRCUIT

January 24, 1958

Action for injuries sustained in operation of a well. Defendant's motion for directed verdict was denied and thereafter defendant's motion for judgment notwithstanding the verdict and for summary judgment were granted by the District Court for the Western District of Texas, R. E. Thomason, J., and the defendant appealed. The Court of Appeals, Rives, Circuit Judge, held, inter alia, that in action against employer of independent contractor engaged to drill exploratory oil well under contract which provided that in performance of work contractor was independent

contractor with authority to control and direct performance of details of work and that employer was interested only in results obtained and which provided that work be subject to general right of inspection to secure satisfactory completion, evidence included showing that no employee of employer was present at time of accident when independent contractor's employee's foot and leg gas caught in rapidly revolving clutch of rig and that employee was not working under supervision or direction of any employee of employer was insufficient for jury on issue whether employer itself owed duty of inspection which would have disclosed absence of guard over the clutch.

Affirmed.

1. Master and Servant Key 318(2)

Where contract between owner of oil and gas lease and drilling company provided that in performance of work company was independent contractor with authority to control performance of details of work and that lease owner was interested only in results but that work should meet approval of owner and be subject to general rights of inspection to secure a satisfactory completion of well, the degree of right of supervision and control by owner was not inconsistent with relationship between owner and its independent drilling contractor as such and did not impose on owner any direct duty to employees of independent contractor in absence of actual control of operation by owner or its employees.

2. Workmen's Compensation Key 352

If owner of oil and gas lease had retained authoritative, not merely supervisory, right of control over well-drilling contractor as to means and manner of performing work as well as ultimate results, then independent contractor's employee who was injured because of unguarded clutch would be an employee of oil and gas lease owner within Texas Compensation Act. Vernon's Ann. Civ. St., art. 8306, et seq.

3. Master and Servant Key 318(2)

An employer of independent contractor does not owe a duty to contractor's employees to inspect machinery furnished by contractor, in absence of actual control of the operation, or of any reserved right of control more than that deemed necessary to secure satisfactory completion of the work.

4. Master and Servant Key 319

Where contract between drilling company and owner of oil and gas lease made it duty of company to take safe precautions and to provide for use by company's employees all safety appliances needed for maximum protection against injuries, oil and gas lease owner could not be held liable for injuries to contractor's employee on theory that work was inherently dangerous and that owner owed duty of reasonable care for taking of such precaution.

5. Master and Servant Key 319

Employer's duty, in cases of inherently dangerous work, is nondelegable as to third persons, but duties which con-

tractee owes to employees of independent contractor are less than those owing to third persons.

6. Courts Key 365(22)

The federal court must look to Texas courts for statements of public policy of that state with regard to employer's liability for injuries to independent contractor's employee.

7. Master and Servant Key 319

Under Texas law, the rule that employer of an independent contractor is liable to third persons for negligence of independent contractor in performance of work inherently dangerous does not extend to employees of independent contractor.

5. Master and Servant Key 319

Alleged fact that drilling of exploratory well was inherently dangerous would not impose liability upon owner of oil and gas lease which had contracted with drilling company for drilling of well for injuries to company's employee because of absence of guard on rapidly revolving clutch of rig which was in charge of company's crew.

9. Courts Key 405(16-10)

Where rulings on admissibility of evidence were not included either in statement of points on which appellants intended to rely on appeal that were served on appellee, or in specifications of error in appellants' original brief, and such rulings did not constitute plain error affecting sub-

stantial rights which would require reversal of judgment in interest of justice, such rulings would not be reviewed. Fed. Rules Civ. Proc. rule 75(d), 28 U. S. C. A.; U. S. Ct. App., 5th Cir., rule 24, subd. 2(b), 28 U. S. C. A.

10. Master and Servant Key 332(3)

In action against employer of independent contractor engaged to drill exploratory oil well under contract which provided that in performance of work contractor was independent contractor with authority to control and direct performance of details of work and that employer was interested only in results obtained and which provided that work be subject to general right of inspection to secure satisfactory completion, evidence including showing that no employee of employer was present at time of accident when independent contractor's employee's foot and leg got caught is rapidly revolving clutch of rig, and that employee was not working under supervision or direction of any employee of employer was insufficient for jury on issue whether employer itself owed duty of inspection which would have disclosed absence of guard over the clutch.

John J. Watts, W. O. Shafer, Odessa, Tex., for appellants.

William L. Kerr, Turpin, Kerr & Smith, Midland, Tex., of counsel, for appellee.

Before HUTCHESON, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge.

The question presented is whether, under the evidence, a jury could properly hold the employer of an independent contractor liable for injury to one of that contractor's employees. The injury was caused by the absence of a guard over a rapidly revolving clutch into which the left foot and leg of the employee were sucked and so badly mangled that amputation was necessary. Specifically, the question is whether there was sufficient evidence to sustain a finding that the employer of the independent contractor owed to the contractor's employee a duty of inspection and control, which would have resulted in the discovery and repair of the defect, or in warning the employee of the absence of the guard.

Gulf was the owner of an oil and gas lease covering "flat ranch land." It contracted with Hall & Stewart Drilling Company for the drilling of an exploratory well. The contract was on a printed form, some of the pertinent provisions of which are quoted in the margin.[1]

[1]"This contract made and entered into on this *9th* day of *January, 1952*, between Gulf *Oil Corporation* * * *, hereinafter called 'Gulf', and *Hall & Stewart Drilling Company* * * * hereinafter called 'Contractor.'

(Continued on Next Page)

The contractor furnished the workmen, derrick, engines, motors and machinery. The well had been drilled to a depth of more than 13,000 feet. Sword was a member of a five-man crew working for the drilling contractor. In searching for air leaks which had caused a pressure failure, Sword started over the master clutch, his left foot slipped and was sucked into the clutch with the resultant injury.

(Footnote Continued)

"Witnesseth:

"1. Location of Well:

"Gulf is in possession and control of a certain tract of land situated in *Upton County, Texas* * * * upon which it desires Contractor to drill a well for oil or gas, * * *.

* * * * * *

"8. Safety Precautions:

"Contractor agrees to do all things possible to control and prevent blowouts.

"Contractor agrees to inspect all material furnished by Gulf before using same and to notify Gulf of any defects therein.

"Contractor shall maintain well control equipment in good condition at all times; shall test the blowout preventers at least once each tour by closing the rams; and shall test the master gate valve by closing same each time the drill pipe is pulled.

"Gulf shall have the right to specify to Contractor the design of the surface mud system and control equipment, which are to be approximately as shown on drawing attached to and made a part of Exhibit 'A'. At any and all times during the drilling of this well, the drilling fluid must be of a type and of characteristics acceptable to Gulf, and Gulf shall have the right to make any tests of the drilling fluid which it deems necessary. Drilling with water may, at certain predetermined depth intervals, be acceptable to Gulf; however, it is specifically understood that when and if Contractor elects to so drill, Contractor shall be responsible for any trouble or damage resulting therefrom. In the event the water so used is furnished by Gulf, Gulf shall have the right to require Contractor to discontinue drilling with water and to drill with a low-water-loss mud should Gulf's water supply prove inadequate.

"Contractor shall measure the total length of drill pipe in service, with a steel tape, at approximately each 1,000-foot depth interval and shall also take measurements just before setting casing or liner, and at point where day rate begins, and after reaching final depth.

"Contractor shall provide and have available at all times for use by Contractor's employees engaged in the performance of the work herein undertaken, all safety appliances needed for the maximum protection of Contractor's employee's [sic] against injuries.

"With respect to any work to be performed hereunder, which is to be paid for at day rates, Gulf shall have the right to specify to Contractor the general technique to be employed by Contractor in the performance of all such work; but the actual performance and superintendence of the details of such work shall be by Contractor. While Contractor is operating on day rate basis in the performance of this contract, he shall not be responsible for loss or damage to Gulf's property on the location, nor

(Continued on Next Page)

The master clutch was enclosed on all sides but one. The open side was not easily visible, being only about a foot away from the compound chain guard. Sword's testimony and that of his witnesses went to show that it was customary to have a guard over the open side of the master clutch, made of "a heavy gauge wire mesh so that the air can get to the clutch and it will serve as a guard for a hand or foot to keep out of there." It was undisputed that such a guard would have prevented Sword's injury.

Sword was an experienced roughneck who had been working at this well for about a month. He had not been warned, and did not know that the guard was missing. A very careful inspection was necessary to discover the defect. Mr. King, the driller member of the crew, testified that "I hadn't been working on that rig but about I believe about

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(Footnote Continued)

for loss or damage to any tubular or other equipment ordinarily used below the surface, unless such loss or damage shall be caused by the negligence of the Contractor. Gulf will reimburse Contractor at a reasonable value for Contractor's equipment lost in the hole when not occasioned by the negligence of the Contractor.

* * * * *

"19. Independent Contractor Relationship:

"In the performance of the work herein contemplated Contractor is an independent contractor, with the authority to control and direct the performance of the details of the work, Gulf being interested only in the results obtained. But the work contemplated herein shall meet the approval of Gulf and be subject to the general right of inspection herein provided to Gulf to secure the satisfactory completion thereof. * * *.

"Gulf Representatives' Status:

"The actual performance and superintendance of all work hereunder shall be by Contractor, but Gulf shall be privileged to designate a representative or representatives, who shall at all times have access to the premises for the purpose of observing tests or inspecting the work performed by Contractor, and who shall have the right of determining whether such work is being performed by Contractor in accordance with the provisions of this contract. Such representative, or representatives, shall be empowered to act for Gulf in all matters relating to Contractor's performance of the work herein undertaken. * * *."

two months. * * * And, as far as I know, that guard was never on there from the time I went to work on it." King's attention had been called to the absence of the guard by another, but less serious, accident.

> "Well, one of the roughnecks on the crew dropped a wrench on this clutch, and it broke off an air connection in there. We had to shut the rig down and repair this clutch, and I helped make the repairs on it."

King further testified that he reported that matter to his "tool pusher," Underwood, and that it was included in a written drilling report signed by H. E. Ingle, Gulf's Area Drilling Foreman.

Mr. Ingle was the only representative of Gulf "assigned to that well to do any work about it in this stage of the operations where he received his injuries." He had never made any inspection of the master clutch or of the condition of any of the equipment or tools being used by the contractor. He admitted having signed a drilling report on July 3, 1952, about two and one-third months before the accident, containing the statement that the crew of which Mr. King was driller had to repair the master clutch air line,[2] but explained, "It says that on the report. but it was of no concern of mine." On cross-examination, Mr. Ingle testified in part:

> "Q. Yes. Now, during your twenty-three years with the Gulf, they have been letting drilling contracts and having you on the job for them as company representative how long? A. Nine years.
>
> "Q. Nine years? A. Yes.

[2]So far as we can discern, the drilling report did not inform Ingle or Gulf of a continued absence of a guard over the open side of the master clutch.

"Q. And they never have changed the rules any with reference to their instructions to you, have they? A. No, sir.

"Q. Mr. Raymond Knox, that's out there in the witness room, he occupied the position down there in Crane County as drilling foreman on the job before you ever went down there, didn't he, for the Gulf? A. Yes, sir.

"Q. And you know that all during the time that the Gulf has given instructions to company foremen to inspect equipment on jobs such as this, including the master clutch and other conditions in order to see if the place that those men are working on Gulf oil wells are safe, don't you? * * * A. I have never been instructed to inspect any equipment of the contractors by the Gulf Oil Corporation.

"Q. And you have been instructed as a drilling foreman for the Gulf during those years that if there is any dangerous condition, such as this thing would be, to order the contractor to repair it, haven't you? A. I said I never have been instructed to inspect any equipment hired by the contractor nor to order any of it to be repaired."

In rebuttal the plaintiff introduced Raymond Knox, who testified that he left Gulf's employment as its drilling foreman in 1951, and further:

"Q. Mr. Knox, during the years that you were a drilling foreman acting as a company representative for the defendant in this case, Gulf Oil Corporation, on jobs wherein they had drilling contractors carrying on the work, did the Gulf give you instructions to inspect the equipment on those rigs, and in the event any unsafe condition was found and objections such as the master clutch being without a guard, to order the drilling contractor to make the necessary changes? A. They did."

The district court denied Gulf's motion for a directed verdict. After hours of deliberation, the jury reported that they were in hopeless deadlock, and were then discharged. Thereafter, Gulf moved for judgment notwithstanding the verdict and also for summary judgment, and the court granted both motions and entered judgment for the defendant.[3]

Appellants do not argue that Gulf is vicariously liable for the tort of its independent contractor. Their position is that it was a question for the jury, under the facts and circumstances of the case, as to whether Gulf itself owed a duty of inspection which would have disclosed the absence of the guard over the clutch.

[1] As has been noted, footnote 1, *supra*, the contract provided that in the performance of the work the contractor was an independent contractor with the authority to control and direct the performance of the details of the work, and that Gulf was interested only in the results obtained. The contract continued: "But the work contemplated herein shall meet the approvel of Gulf and be subject to the general right of inspection herein provided to Gulf to secure the satisfactory completion thereof." That degree of right of supervision and control was clearly reserved for the benefit of Gulf itself, in its legitimate concern for the protection of its investment and properties and the satisfactory completion of the well. It was desirable

[3] The appellants do not complain of the court's failure to reserve its decision on the motion for directed verdict as suggested in Rule 50(b), Federal Rules of Civil Procedure, 28 U.S.C.A. See Slocum v. New York Life Ins. Co., 1913, 228 U.S. 364, 381, 33 S.Ct. 523, 57 L.Ed. 879, commented on in 2 Moore's Federal Practice, 2nd ed., Paragraph 2.04, pp. 326, 327, and 5 Id., Paragraphs 50.01(8), 50.07, and 50.10.

also for the protection of other persons who might come on the premises at Gulf's invitation before the completion of the drilling; such as employees of companies specializing in drill stem testing, cementing, perforating well casing, casing testing, coring, acidizing, and other well services. That degree of right of supervision and control was not inconsistent with the relationship between Gulf and its independent drilling contractor as such, and did not impose on Gulf any direct duty to the employees of its independent contractor, in the absence of actual control of the operations by Gulf or its employees.

The evidence was without dispute that no Gulf employee was present at the time of the accident; that Sword "hadn't seen a Gulf man in several days before the time you got hurt," and that Sword was not working under the supervision or direction of any Gulf employee. There was no actual control by Gulf that had any relation to Sword's injury.

[2] If Gulf had retained authoritative, not merely supervisory, right of control over the well-drilling contractor as to means and manner of performing the work as well as ultimate results, then Sword would be an employee of Gulf within the Texas Workmen's Compensation Act, Vernon's Ann. Civ. St., art. 8306, et seq.; [4] and Sword has, of course, already been paid compensation by the intervener appellant. Able counsel for the appellants do not claim such a degree of control or a right thereof as would constitute Sword an employee of Gulf, but insist that the lesser degree

[4] Standard Ins. Co. v. McKee, 1947, 146 Tex. 183, 205 S.W.2d 362, 363, 364.

of control reserved did impose on Gulf a duty to Sword within the principle stated in the Restatement of Torts, § 414, quoted with the comment thereto in the margin.[5]

Appellant relies especially upon the many Texas cases cited in the opinion by Judge Brown in Gulf Oil Corporation v. Wright, 5 Cir., 1956, 236 F. 2d 46, and supporting the principle stated at page 52:

> " * * * The relationship under Texas law between an occupier of land and his invitees (including employees of an independent contractor) and between a general contractor and employees of subcontractors is the same, Roosth & Genecov Production Co. v. White,

[5] "§ 414. Negligence in Exercising Control Retained by Employer.

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for bodily harm to others, for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

"*Comment:*

"a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the Law of Agency which deals with the relation of master and servant. The employer may, however, retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

"b. The rule stated in this Section is usually, though not exclusively, applicable when a principal contractor entrusts a part of the work to subcontractors but himself or through a foreman superintends the entire job. In such a situation, the principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors' work is being so done and has the opportunity to prevent it by exercising the power of control which he has retained in himself. So too, he is subject to liability if he knows or should know that the subcontractors have carelessly done their work in such a way as to create a dangerous condition and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the subcontractor to do so." Restatement, Torts, § 414, pp. 1120-22.

152 Tex. 619, 262 S. W. 2d 99; Smith v. Henger, 148 Tex. 456, 226 S. W. 2d 425, 20 A.L.R. 2d 853, and gives rise to a like duty, 'Accepting * * * the status of the plaintiff * * * as that of business invitee, the defendant owed him a duty to use reasonable care to make and keep the premises reasonably safe for his use * * *', Triangle Motors of Dallas v. Richmond, 152 Tex. 354, 258 S. W. 2d 60, 62; Hall v. Medical Building of Houston, 151 Tex. 425, 251 S. W. 2d 497; Smith v. Henger, supra; Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S. W. 2d 609; Weingarten, Inc., v. Brockman, 134 Tex. 451, 135 S. W. 2d 698; McKee v. Patterson, 153 Tex. 517, 271 S. W. 2d 391, 393 * * *."[6]

Particular attention is called to the decisions of the Supreme Court of Texas in Smith v. Henger, 1950, 148 Tex. 456, 226 S. W. 2d 425, 430, 431, 20 A. L. R. 2d 853; Roosth & Genecov Production Co. v. White, 1953, 152 Tex. 619, 262 S. W. 2d 99, 101; and Robert E. McKee, General Contractor v. Patterson, 1954, 153 Tex. 517, 271 S. W. 2d 391, 395.

[3] This opinion would be extended unreasonably, and no useful purpose would be served, by a discussion of the many Texas decisions, or of those from this Court, relied on by the respective parties. It is sufficient to note that none of them goes so far as to hold, or to support a holding, that an employer of an independent contractor owes a duty

[6] Insofar as the possession of the land may be concerned, it was stipulated:

"* * * that the Gulf Oil Corporation was the owner of an oil and gas lease when it entered into the contract that was made with Hall & Stewart, and that when it delivered possession of its oil lease to the contractor it delivered to him a flat piece of land, on which the drilling of the well commenced and was carried to the point at which the accident happened."

Of course, the possession delivered to the contractor was not exclusive of Gulf and its employees and invitees.

to the contractor's employees to inspect the machinery furnished by the contractor, in the absence of any actual control of the operation, or of any reserved right of control more than that deemed necessary to secure the satisfactory completion of the work.[7]

[4] As another basis of liability, the appellants urge that the work was inherently dangerous in the absence of special precautions; and that the employer of the independent contractor, charged with so foreseeing, owed a duty of reasonable care for the taking of such precautions. Assuming, without deciding, that this is a case of inherently dangerous work, or that the jury would have been warranted in so holding, the general law seems to be that the employer must, by his contract, impose the duty upon the independent contractor to take the necessary special precautions. Restatement, Torts, §413(a), p. 1119. As has been seen, footnote 1, *supra*, the contract made it the duty of the contractor to take safety precautions, and specifically to "provide and have available at all times for use by Contractor's employees engaged in the performance of the work herein undertaken, all safety appliances needed for the maximum protection of Contractor's employee's [sic] against injuries."

[5] Appellants urge, however, that the employer's duty, in cases of inherently dangerous work, is nondelegable. As

[7] Otherwise, the "prediction" of which Dean Prosser takes note, that "* * * ultimately the 'general rule' will be that the employer is liable for the negligence of an independent contractor," Prosser on Torts, 2d ed., p. 358, would be close to present reality in Texas.

to third persons, that is true,[8] but it has been observed that "* * * the duties which a contractee owes to employees of the independent contractor are less than those owing to third persons." 57 C. J. S. Master and Servant, §600, p. 372.

The reasons for the rule of nonliability for the torts of an independent contractor have been well stated in 27 Am. Jur., Independent Contractors, §27, pp. 504, 505, 506:

> "* * * This rule of the nonliability of an employer is based upon the theory that the characteristic incident of the relation created by an independent contract is that the employer does not possess the power of controlling the person employed as to the details of the stipulated work, and it is, therefore, a necessary judicial consequence that the employer shall not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor. The general rule has also been said to rest upon the ground that a contractor, pending the performance of the work, is, to a certain extent, substituted for the person for whom the work is to be performed. However, the real basis for the rule seems to be public policy."

[6-8] We must look to the Texas courts for statements of the public policy of that State. It was held in Humble Oil & Refining Co. v. Bell, Tex. Civ. App., 180 S. W. 2d 970, 975, 976, that the rule that an employer of an independent contractor is liable to third persons for negligence of the independent contractor in the performance of work

[8]For pertinent example, the comment to Section 416 of the Restatement of Torts contains the following:

"* * * However, the fact that the contract contains express stipulations for the taking of adequate precautions and that the contractor agrees to assume all liability for harm caused by his failure to do so, does not relieve his employer from the liability stated in this Section." Restatement of Torts at pp. 1128-1129.

inherently dangerous does not extend to employees of the independent contractor, and that holding has been twice followed by this Court. Union Tank & Supply Co. v. Kelley, 5 Cir., 1948, 167 F. 2d 811, 816; Cagle v. McQueen, 5 Cir., 1952, 200 F. 2d 186, 190. Appellants vigorously urge that such is no longer the law of Texas. The same principle was, however, reaffirmed in the very late case of Nance Exploration Co. v. Texas Employers' Ins. Ass'n, Tex. Civ. App. 1957, 305 S. W. 2d 621, 627, 628. We must conclude that the fact, if it be a fact, that the work was inherently dangerous would not impose liability upon Gulf.

[9] In a supplemental brief, filed after the oral argument, appellants ask that we review certain rulings of the district court on the admissibility of evidence. Those rulings were not included either in the statement of points on which the appellants intended to rely on appeal that were served on the appellee,[9] or in the specifications of error in appellants' original brief.[10] In our opinion, the rulings complained of clearly do not constitute plain error affecting substantial rights and would not require a reversal of the judgment in the interest of justice. We therefore forego reviewing the rulings on admissibility.

[10] We agree with the district court that the evidence in this case would not sustain a finding that Gulf owed any duty to Sword to inspect, and to supervise the operation of, the machinery furnished by Sword's employer. The judgment is therefore

Affirmed.

[9]Under Rule 75(d), Federal Rules of Civil Procedure, 28 U.S.C.A.
[10]Required by Rule 24, 2(b) of the Fifth Circuit, 28 U.S.C.A.

APPENDIX B

ORDER RECALLING AND STAYING JUDGMENT ISSUED AS MANDATE FILED:—

June 26, 1958.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 16357

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Appellants,

versus

GULF OIL CORPORATION,

Appellee.

ON CONSIDERATION OF THE PETITION of Appellants for recall and stay of judgment issued as mandate in the above numbered and entitled cause, to enable appellants to apply for and to obtain a writ of certiorari from the Supreme Court of the United State, IT IS ORDERED that the judgment issued as mandate to the Clerk of the United States District Court, at Pecos, Texas, on May 12, 1958, be recalled and stayed for a period of thirty days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from

the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

/s/ RICHARD T. RIVES
United States Circuit Judge

June 26, 1958.